Supreme Court, U. S.
FILED
DEC 6 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-805

CALVIN C. FRANKLIN,

Petitioner,

versus

THE STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No.

CALVIN C. FRANKLIN,
Petitioner,

versus

THE STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF GEORGIA

OPINIONS IN THE COURTS BELOW

The Order of the Superior Court overruling Petitioner's Motion to Suppress and the opinion of the Georgia Court of Appeals (with dissent), which was reported at 143 Ga. App. 3 (____SE2d ____) are set out in full in the appendices hereto.

GROUNDS FOR INVOKING THIS COURT'S JURISDICTION

The Judgment of the Georgia Court of Appeals was entered on July 1, 1977 and a rehearing denied on July 19, 1977. The Supreme Court of Georgia denied Petitioner's Application for Writ of Certiorari on

September 8, 1977 with two Justices dissenting and one not participating. Motion for Reconsideration was denied on September 27, 1977. Jurisdiction of this Court is invoked pursuant to 28 USC §1257(3).

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the blocking of petitioner's aircraft and the subsequent ordering of petitioner from his aircraft by police officers with drawn arms constitutes an "arrest" and, as such, requires probable cause to establish its constitutional validity.

(2) Whether an investigatory stop of an individual is authorized only when the arresting police officers or his superiors have an articulable suspicion with respect to such individual that dictates a limited seizure of such individual for only a brief and reasonable length of time in order to ascertain from such individual certain information pursuant to and in connection with their articulable suspicions.

(3) Whether an articulable suspicion sufficient to authorize an investigatory stop must be known to the police officers who are actually making the investigatory stop, or otherwise the traditional showing of probable cause should be required.

(4) Whether a search incident to a seizure of petitioner, based on less than probable cause, may be upheld when the arresting police officers were relying on a non-police message from another state requesting the arresting police to hold an aircraft without any explanation of the causes or underlying circumstances of such request.

(5) Whether a constitutional investigatory stop necessarily entails as its objective, an attempt by the police officers making the stop to obtain information pursuant to questions which they have already formulated pursuant to their articulable suspicions; i.e., must the police officers know what they intend to investigate at the moment they seize an individual if the investigatory stop is to be held valid.

THE CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

Amendment IV to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Georgia Code §27-707 (Arrest without Warrant):

An arrest for a crime may be made by an officer, either under a warrant, or without a warrant if the offense is committed in his presence, or the offender is endeavoring to escape or for other cause there is likely to be failure of justice for want of an officer to issue a warrant.

Georgia Code §27-301 (Search without Warrant):

When a lawful arrest is effected a peace officer may reasonably search the person arrested and the area within such person's immediate presence for the purpose of:

(a) Protecting the officer from attack; or
(b) Preventing the person from escaping; or
(c) Discovering or seizing the fruits of the crime for which the person has been arrested; or
(d) Discovering or seizing any instruments, articles, or things which are being used, or which may have been used, in the commission of the crime for which the person has been arrested: Provided, however, when the peace officer is in the process of effecting a lawful search, nothing in this action shall be construed as precluding him from discover-

ing or seizing any stolen or embezzled property, any item, substance, object thing or matter the possession of which is unlawful, or any item, substance, object, thing or matter other than the private papers of any person which is tangible evidence of the commission of a crime against the laws of the State of Georgia. (Acts 1966, p. 567)

CONCISE STATEMENT OF THE CASE

On the day and night of June 19-20, 1976, petitioner was the pilot of an executive transport-type aircraft (Lockheed Learstar) with its destination being Atlanta, Georgia. Due to extremely bad weather resulting in the failure of all major navigational instruments of the aircraft, petitioner became lost and eventually landed at a lighted airport which turned out to be at Anniston-Oxford, Alabama. Upon landing, the police were notified by an FAA traffic control specialist and told that the subject plane had "landed without authorization" (the aircraft's arrival was unannounced since its radios were not working, and even had they been, they would not have known what frequency to use since the pilot did not know where he was) and three Anniston, Alabama police officers responded to the call.

The only passenger alighted from the aircraft to meet with the three police officers and informed them that he and petitioner (pilot) were destined for Atlanta, Georgia and had become lost due to the bad weather. After inquiring as to his present whereabouts, and being supplied the information requested by the Alabama police officers, the passenger re-boarded the

plane unimpeded. As the aircraft's engines started, apparently one police officer attempted to detain it but could not effectively get the attention of either petitioner or the passenger as the aircraft noisily taxied down the runway. It should be noted that these police officers were responding to a report of a suspected "unauthorized landing" which, without dispute from the State, is neither a crime nor a violation of any FAA regulation, as no authorization was needed to land at the airport in question. No radio call was, in fact, required — it is "usual", but not required.

In some way, *other than* through the police authorities, but probably through FAA channels, a message was relayed to Fulton County, Georgia police to hold the aircraft for "authorities" in Alabama. *No description* of the aircraft or its occupants was given *nor any explanation as to why the Alabama authorities wanted the aircraft held.* No charges were made against the aircraft or its occupants and all witnesses admit that no illegal conduct of any sort was observed by them with respect to either the aircraft or its occupants.

Petitioner landed the aircraft at the Fulton County, Georgia airport and as he was taxiing towards the terminal, two Fulton County police cars and one airport security car blocked the taxiway. Petitioner, having no other choice, stopped his engines and asked from the cockpit to be allowed to taxi on to the terminal. The Fulton County police officers, armed with shotguns, ignored petitioner's request and ordered him out of the aircraft immediately with his hands up. Petitioner disembarked and was immediately searched while leaning against the aircraft and was then led to the back of

a police car and *locked* in. Subsequently the police found the subject marijuana on the aircraft. Petitioner was charged and indicted for possession of more than one ounce of marijuana with intent to distribute same in violation of the Georgia Controlled Substances Act. Prior to trial, on September 30, 1976, petitioner filed his "Motion to Suppress" all evidence obtained from the search incident to the unlawful arrest.

The evidence from said hearing reveals that *no warrant* for the arrest and/or search of petitioner and the subject aircraft had been issued. The arresting police had *no identification* of the subject aircraft or its occupants and the aircraft piloted by petitioner apparently just happened to be the next aircraft to land at Fulton County airport after the police arrived at the airport. In fact, the police were informed that the aircraft requested to be held had already landed at the airport. *No offense* of any type was committed in the presence of the arresting officers prior to the arrest, *nor had the arresting officers been informed that either petitioner or the subject aircraft had committed any type of offense.* The arresting officers were simply asked to hold the subject aircraft and petitioner for Alabama "authorities". In fact, there is no evidence from the record that the initial call to the Fulton County police had come from the police authorities in Alabama and it appears that the call was made by and through the FAA.

At the hearing on the Motion to Suppress, the arresting officers *admitted* that they did not know who they were to hold, or why they were to hold them — even admitting it could have been because someone on board had a sick child in Alabama.

Petitioner's Motion to Suppress was denied on November 10, 1976 and he instituted an interlocutory appeal to the Court of Appeals of Georgia.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner filed a Motion to Suppress contending that the evidence against him (the contraband) was seized in violation of his rights under the Fourth and Fourteenth Amendments to the Constitution of the United States. Said Motion was denied on November 10, 1976 and petitioner promptly filed an interlocutory appeal to the Court of Appeals of Georgia. The Court of Appeals (two judges dissenting) affirmed the ruling of the trial court.

REASONS FOR GRANTING THE WRIT

A. It Should Be Made Clear That An Arrest Occurs At The Moment One Is Ordered From His Vehicle At Gunpoint.

Traditionally, an arrest is effected whenever the liberty of another is restrained. As stated in numerous earlier decisions in Georgia: "An arrest is accomplished whenever the liberty of another to come and go as he pleases is restrained, no matter how slight such restraint may be. The defendant may voluntarily submit to being considered under arrest without any actual touching or show of force, and the arrest is complete. [Cits.] The mere fact that the officer testifying with regard to these occurrences stated at one place in his testimony that after he had completed search, he then 'placed him under arrest' does not alter the fact that the defendant was actually under arrest

from the moment the police officers approached the automobile which he was driving and caused him to alight therefrom under the force and restraint of drawn guns." *Clements vs. State*, 226 Ga. 66, 67 (172 SE2d 600); *Strong vs. State*, 231 Ga. 514, 518 (188 SE2d 879); *Brooks vs. State*, 129 Ga. App. 109, 110 (198 SE2d 892); *Rogers vs. State*, 131 Ga. App. 136 (205 SE2d 473); *Hill vs. State*, 140 Ga. App. 121 (230 SE2d 236).

It is respectfully submitted that petitioner was under "arrest" at the very moment the police first forcefully and seriously interrupted his liberty — and that occurred when they blocked his aircraft and with weapons drawn, ordered petitioner from his cockpit. *Henry vs. U.S.*, 311 U.S. 99, 103 (1959). Consistent with this position is *U.S. vs. Strickler*, 490 F.2d 378 (9th Cir. 1974), where it was held that the conduct of the police in approaching a vehicle, armed with a gun and encircling the vehicle in question, constituted an arrest and thus probable cause was needed. The restriction of one's "liberty of movement" was complete, the Ninth Circuit said, when the defendant was encircled by police and confronted with official orders at gunpoint. See *Rios vs. U.S.*, 364 U.S. 253 (1960); *Henry vs. U.S.*, supra. Traditionally, the Appellate Court of Georgia, to which petitioner seeks certiorari, had consistently held that "whenever a police officer accosts a person or restrains his freedom to walk away, he has seized that person." *Holtzendorf vs. State*, 125 Ga. App. 747, 749 (188 SE2d 879). The decision below "changes" what had been well settled law due to, it is believed, erroneous interpretation of this Supreme Court's decision in *Terry vs. Ohio*, 392 U.S. 1 (1968), and the failure of this Court in *Beck vs. Ohio*, 379 U.S. 89 to establish at just what point an arrest is made. After a review of the ample authority it is apparent that

proper constitutional construction, it is submitted, should have demanded a finding, as a matter of constitutional right, that petitioner was under arrest when his liberty was restrained in the manner here used.

This Court should now fill the gap left by *Beck vs. Ohio*, supra, by squarely deciding, as did the Ninth Circuit in *U.S. vs. Strickler*, supra, that the ordering of one from his vehicle at gun point is an arrest — at that moment.

B. This Court Should Clarify The Distinction Between A "Terry Stop" And An Arrest

Since this arrest (as petitioner contends it was) was without an arrest warrant, its validity necessarily rests on a finding of probable cause at the moment petitioner's liberty was in fact restrained. To determine the presence or absence of probable cause to arrest, one must consider the totality of the circumstances surrounding the arrest. As the Supreme Court stated in *Beck vs. Ohio*, 379 U.S. 89 (1964):

> "Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it — whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that petitioner had committed or was committing an offense." See also *U.S. vs. Bowers*, 458 F.2d 1045 (5th Cir.).

In light of this analysis, the officers were clearly without probable cause. Here, there was no arrest warrant. Nor was there any offense committed during the observation of the aircraft. There was no offense in the officer's presence nor attempts to escape. The arresting officers were not even told of any offense, actual or suspected. Even the trial judge agreed that there was no probable cause such as would have supported the issuance of a warrant (Tr. 64). As stated by the appellate court in this case, "Because probable cause for an arrest did not exist until the marijuana was actually spotted inside the plane, we must determine whether sufficient evidence existed for a determination by the trial judge that the defendant's initial confrontation with the police was in the context of a Terry stop." *Franklin vs. State*, 143 Ga. App. 3, 4, ___ SE2d ___ (1977).

Certainly one of our most jealously guarded rights is the right to be free from unreasonable searches and seizures as provided for in the fourth and fourteenth amendments to the Constitution of the United States. *The question of when a Terry stop ends and an arrest begins is one that has arisen often, but unfortunately, with divergent and inconsistent results.* By virtue of the great danger that the Terry stop will be used as a guise for warrantless searches and seizures, careful judicial safeguards should be exacted. As stated in *U.S. vs. Ramos-Zaragosa*, 516 F.2d 141, 144-145 (9th Cir., 1975):

> "The line between evidence seized pursuant to an unlawful arrest which must be suppressed

> . . . and evidence seized on the basis of probable cause which developed concurrently with the reasonably brief investigatory stop . . . is a difficult one to draw and follow."

Central to the resolution of the issue presented by the case at bar is a determination of what requirements are needed in order to have a valid Terry stop. It is (or was until recent years) clear that the Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. *Davis vs. Mississippi*, 394 U.S. 721 (1968).

This Court has noted that without judicial standards the Terry stop could potentially lead to unlimited interference by police. Consequently, in *U.S. vs. Brignoni-Ponce*, 422 U.S. 873 (1975), it was held that in order to justify an investigative search with less than probable cause existing, the officer in question must be *aware* of *specific articulable facts* arising from his personal observation and which reasonably warrant suspicion that a crime has been or is about to be committed. Also, if a Terry stop may be used "to maintain the status quo", its validity must be judged by the facts *known to the officer at the time of the stop. Adams vs. Williams*, 407 U.S. 143 (1972). In Terry terms, the officer must be able to point to specific and articulable facts and our concern is to determine what the record shows the officer knew on the scene at the time of the Terry stop. *U.S. vs. Tharpe*, 536 F.2d 298 (5th Cir. 1976).

Turning to the case *sub judice*, it is quite apparent that the encounter with the petitioner by the arresting

police officers was based merely on, at most, a naked suspicion without any supportive facts. In fact, the arresting officers had no idea what the crew of the subject plane was suspected of (Tr. 41-42) and yet they had pre-determined that they were going to hold the pilot *regardless* of what their investigation revealed (Tr. 49). It is rather paradoxical to hold that the surrounding of petitioner's aircraft by the police was not an arrest, but rather an investigative stop in light of the fact that the officers had no idea of what conduct they were investigating; and regardless of what was actually revealed by their stop, the police, by their own testimony (Tr. 49), had a fixed intention of holding the subject plane along with petitioner "for the Alabama authorities". Since the police in question had no idea why they were "investigating" the subject airplane, it is urged that by definition it was impossible to have a valid Terry stop. It is respectfully submitted that in order to "investigate" there must be something specific sought; and to have a "reasonable suspicion" certainly means, at least, that one knows what he is suspicious of. As stated in *U.S. vs. Tharpe*, 536 F.2d 298 (5th Cir., 1976), "judicial analysis of a purported Terry search must focus on the facts known to the officer on the scene of the encounter and the emphasis of risk of danger reasonably drawn from the totality of those specific circumstances".

It is respectfully submitted that this Court should now hold that a bare radio message to "hold" an aircraft, with no reason given, is *not* an "articulable suspicion" sufficient to authorize an investigatory stop, much less a shotgun-point arrest.

C. This Court Should Hold That A "Suspicion" Of Having Committed A Regulatory Offense In One State Cannot Form The Probable Cause Needed For An Arrest Without A Warrant In Another State.

Besides not having any "articulable facts" the arresting officers were not asked to stop the subject airplane and investigate, but rather were asked to "hold the plane for Alabama authorities". Moreover, nothing in the record indicates that Alabama police were the ones who were requesting that the plane be held. It appears that the communications from Alabama to Georgia came solely through FAA channels. This "hold" request cannot be construed as anything but a request for an arrest, particularly since the arresting officers were not given any information as to what was to be investigated, but only told to hold the plane. It should be noted that the Alabama police had no suspicion of any activity other than the possibility (conveyed to them by an FAA employee in Alabama) that petitioner had made an "unauthorized landing". That would be, at most, a regulatory offense. The petitioner had been stopped and questioned in Alabama, i.e. a Terry stop was effected there. It should be noted that at the hearing both Alabama and FAA authorities admitted that there was no such crime or offense as an "unauthorized landing" committed. Here the order to stop and hold the petitioner in Georgia for a non-existent regulatory offense in Alabama was an arrest order that was put into effect when petitioner's liberty was restrained and he was ordered from his aircraft at shotgun point. *Kelly vs. State*, 129 Ga. App. 131, 133(2), 198 SE2d 910 (1973). See *Whitley vs. Warden*, 401 U.S. 560 (1971).

CONCLUSION

In the decision by the Court of Appeals of Georgia in this case, Presiding Judge Quillian wrote an excellent dissenting opinion [with concurrence by the only other appellate Judge hearing the oral argument] from which we quote an excerpt:

> "In summary, the instant case follows one mistake upon another. First, there was no "founded suspicion" or "specific articulable facts" to base a Terry-type stop — only "suspicion." Second, only the FAA official had any "suspicion". Third, that "suspicion" was not communicated to the [arresting Fulton County, Georgia] police. Fourth, a spurious offense that never existed was communicated to the [Alabama] police to make a "Terry-type" stop. Fifth, a "Terry-type" stop was made in Anniston, Alabama, and the police were given the reasons for their presence at that airport. See Adams v. Williams, 407 U.S. 143, 146 (92 SC 1921, 32 LE2d 612). Sixth, the attempt to stop defendant from leaving the Anniston airport was based on the non-existing offense of "unauthorized landing". Seventh, there is no evidence that Alabama police authorities issued the "stop" and "hold" order. FAA officials in Alabama communicated with Georgia FAA officials. Eighth, Fulton County officials were directed to arrest the defendant — not to make a Terry-type stop. Ninth, regardless of directions from "Alabama authorities", the defendant was arrested at that point in time where the police blocked his

path with police cars, stopped his airplane, exhibited two shotguns and ordered him to leave the airplane. Henry vs. United States, 361 U.S. 98, 103, supra; Beck v. Ohio, 379 U.S. 89, 91 (85 SC 223, 13 LE2d 142); Terry v. Ohio, 392 U.S. 1 (88 SC 1868, 20 LE2d 889); *Clements v. State*, 226 Ga. 66, 67, supra; *Strong v. State*, 231 Ga. 514, 518, supra. The arrest being without probable cause, the search that followed was illegal.

I would reverse." [Matter in brackets added for clarity.]

It is respectfully submitted that this Court's Writ of Certiorari should be granted so that the extremely important issues may be determined as to when and under what circumstances an investigatory stop is permissible and so as to give guidelines to the lower courts as to the distinction between an arrest and a Terry type investigatory stop. Stopping an airplane by physically blocking the main taxiway of a very busy airport for no known reason other than having been asked to "hold" the aircraft is a far cry from this Court's initial reasoning in *Terry v. Ohio*, 392 U.S. 1. If careful standards are not established, an apparent erosion of the Fourth Amendment will certainly follow, for it is very likely (as the case at bar graphically illustrates) that the police will utilize Terry stops as their guise for warrantless searches and seizures. Practically anyone can be stopped for "an investigation" and *suspicion* is far less subject to judicial analysis than is probable cause.

This case brings into focus the necessity of establishing solid grounds and limitations for "investigatory stops". To be free from unreasonable searches and seizures is a cornerstone of our free society. Yet, unreasonable searches and seizures are being effected and now judicially upheld by the lower courts on the premise that they were only investigatory stops. This Court must set out the necessary guidelines for the courts below.

PRAYER

WHEREFORE, the petitioner prays that this Court issue the Writ of Certiorari to the Court of Appeals of Georgia.

Respectfully submitted,

/s/ FLOYD E. SIEFFERMAN, JR.

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December 5, 1977

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the above and foregoing Petition have this date been served upon opposing counsel of record by placing the same in the United States mail, postage prepaid and properly addressed.

December 5, 1977.

/s/ FLOYD E. SIEFFERMAN, JR.

FLOYD E. SIEFFERMAN, JR.

APPENDIX A

ORDER DENYING
DEFENDANT'S MOTION TO SUPPRESS

In the Superior Court of Fulton County
State of Georgia

THE STATE OF GEORGIA

versus Case No. A-32152

CALVIN CHRISTOPHER FRANKLIN

The Defendant's Motion to Suppress coming on regularly to be heard by the Court, after the introduction of evidence and argument of counsel thereon, it is hereby considered, ordered and adjudged that the same be and it is hereby denied.

This 10th day of November, 1976.

/s/ JOEL J. FRYER
JOEL J. FRYER, JUDGE
FULTON SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

CERTIFICATE FOR IMMEDIATE REVIEW

In The Superior Court of Fulton County
State of Georgia

THE STATE OF GEORGIA

versus Case No. A-32152

CALVIN CHRISTOPHER FRANKLIN

The undersigned trial judge hereby certifies within 10 days of the entry of his Order Overruling the Defendant's Motion to Suppress, said Order being dated November 10, 1976 and entered November 10, 1976, that such Order of the Court overruling Defendant's Motion to Suppress is of such importance to the case that immediate review thereof should be had by the Court of Appeals or Supreme Court of the State of Georgia.

This 10th day of November, 1976.

/s/ JOEL J. FRYER
JOEL J. FRYER, JUDGE
FULTON SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

APPENDIX B

In the Court of Appeals of Georgia

CALVIN C. FRANKLIN,
Appellant,

versus Case No. 53600

THE STATE OF GEORGIA,
Appellee.

BANKE, Judge.

The defendant was indicted for violation of the Georgia Controlled Substances Act after being found in possession of nearly three thousand pounds of marijuana The defendant moved to suppress the evidence as the fruit of an illegal arrest. He now appeals from the trial court's dismissal of his motion to suppress.

The defendant was the pilot of a plane which was importing marijuana into the United States. The plane became lost in bad weather and landed at Anniston, Alabama. Before leaving the Anniston airport, the defendant aroused the authorities' suspicion as to the nature of his cargo, and local police attempted unsuccessfully to stop him before he hastily returned to the skies, bound for Atlanta.

Georgia authorities were notified of the plane's approach, and a radio call went out to Fulton County police officers near the Charlie Brown Airport to hold the plane for authorities in Alabama.

Police officers arrived at the airport moments before the defendant's plane landed, blocked the taxiway, and, armed with shotguns, awaited the defendant's arrival When the defendant landed and neared their cars, he was ordered to get out of the plane. While he was doing so, officers saw the marijuana inside the plane and, according to their version of the facts, arrested the defendant at that time.

The defendant contends that when his vehicle's motion was blocked by police cars and he was accosted by officers armed with shotguns an arrest had already occurred. It is the state's contention that the defendant was not arrested until *after* the officers saw his cargo and that the armed blockage of the taxiway amounted merely

to an "investigatory stop," as allowed by Terry v. Ohio, 392 U. S. 1 (1968). Because probable cause for an arrest did not exist until the marijuana was actually spotted inside the plane, we must determine whether sufficient evidence existed for a determination by the trial judge that the defendant's initial confrontation with the police was in the context of a Terry stop.

1. The defendant landed in Anniston in a World War II vintage aircraft of a type known to be regularly used in drug trafficking. He landed without contacting the control tower, as is customary, and drove his aircraft much faster than is normal on the ramp. He refused to disembark from the plane when asked to do so by Anniston police and took off rapidly, without going through the customary aircraft pre-flight checklist. Based on these observations, Anniston police had an articulable suspicion that contraband was present in the aircraft and thus had the right to detain the defendant for questioning under Terry.

The defendant's plane was followed on radar from Anniston to Atlanta. As Fulton County policemen were approaching Charlie Brown Airport, they were notified by radio that the aircraft had dropped off radar at Hartsfield Airport and appeared to have landed. An officer arrived at the Charlie Brown Airport to see a plane make a low sweep without setting down. There is evidence from which the trial judge could find that the defendant's aircraft was sufficiently determined by Fulton County police to be that which departed from Anniston. Because Anniston officials had sufficient cause to stop the plane under Terry, Fulton County police who were notified by radio to hold the plane for Alabama authorities also had sufficient reason to effect a Terry stop. *Silas v. State*, 133 Ga. App. 560 (1) (211 SE2d 609) (1974); *Quinn v. State*, 132 Ga. App. 395 (1) (208 SE2d 263) (1974).

2. Time of arrest is a question of fact which depends upon an evaluation of the testimony by the trial judge. Rios v. United States, 364 U. S. 253, 262 (1960). There is evidence to support the trial judge's finding that an arrest did not occur until the police saw marijuana in plain view. "Factual and credibility determinations of this sort made by a trial judge after a suppression hearing must be

accepted by appellate courts unless such determinations are clearly erroneous. See Lego v. Twomey, 404 U. S. 477 (92 SC 619, 30 LE2d 618) (1972), and United States v. Watson, 469 F2d 362 (5th Cir. 1972)." *Johnson v. State*, 233 Ga. 58 (209 SE2d 629) (1974).

Blocking the plane with police cars was a reasonable manner of stopping it under the circumstances, considering the possibility of flight by the defendant in a highly mobile aircraft. An investigatory stop is not automatically an arrest simply because an officer is armed with a shotgun. United States v. Worthington, 544 F2d 1275 (5th Cir. 1977); United States v. Maslanka, 501 F2d 208, 213, n. 10 (5th Cir. 1974). It is often necessary for the police to approach a person with a drawn weapon in a suspiciously dangerous situation in order to protect the physical well-being of both police officers and the public. In fact, in a situation very similar to that sub judice, the United States Court of Appeals for the Fifth Circuit recently held that officers acted reasonably in stopping a pilot suspected of transporting marijuana by blocking his plane and ordering him at riflepoint to disembark. United States v. Worthington, supra. The officers' actions in the case at bar in merely holding shotguns is certainly less offensive than in Worthington, where a high-powered rifle was aimed at the pilot.

The Fourth and Fourteenth Amendments to the Constitution prohibit only *unreasonable* searches and seizures. Is a seizure unreasonable simply because the police have taken the precaution to arm themselves in light of unknown danger? We are not prepared so to hold. If we were to reach a contrary result, law enforcement officers would be required to risk their lives by not drawing weapons until drawn upon, unless a hasty legal analysis convinced them that probable cause existed for an arrest.

From *Holtzendorf v. State*, 125 Ga. App. 747, 750 (188 SE2d 879) (1972), the defendant quotes, "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." With this statement we have no quarrel; the defendant was "seized" by Fulton County officers when his aircraft's passage was blocked. The

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6 *Holtzendorf* quote was taken verbatim from Terry v. Ohio, supra, another case where a defendant was seized. However, the court in Terry proceeded to hold that the seizure was not unreasonable under the Fourth Amendment — as we have done here. Therefore, the quote from *Holtzendorf* does not support the defendant's contention that he was necessarily illegally arrested.

The holding of this court in *Kelly v. State,* 129 Ga. App. 131 (2) (198 SE2d 910) (1973), does not conflict with our finding that no arrest occurred prior to discovery of the marijuana. In Division 2 of *Kelly* this court simply held that there was no "articulable suspicion" to support a Terry stop of the defendant's automobile.

Judgment affirmed. Bell, C. J., Deen, P. J., Marshall and McMurray, JJ., concur. Webb, J., concurs in the judgment only. Quillian, P. J., and Shulman, J., dissent. Smith, J., disqualified.

ARGUED MARCH 8, 1977 —DECIDED JULY 1, 1977 —
REHEARING DENIED JULY 19, 1977 —
CERT. APPLIED FOR.

Drug violation. Fulton Superior Court. Before Judge Fryer.

Chambers, Siefferman, Robinson & Cooper, Floyd E. Siefferman, Jr., for appellant.

Lewis R. Slaton, District Attorney, Joseph J. Drolet, Donald J. Stein, R. David Petersen, Assistant District Attorneys, for appellee.

QUILLIAN, Presiding Judge, dissenting.

I concur in the dissent of Judge Shulman. However, I must also dissent from the First Division of the opinion. It should be noted that the majority based its opinion on the "two-step" premise: (1) "*Anniston police* had an articulable suspicion that contraband was present in the aircraft and thus had the right to detain the defendant for questioning under Terry [Terry v. Ohio, 392 U. S. 1 (88 SC 1868, 20 LE2d 889)] . . . [thus] (2) Because Anniston officials had sufficient cause to stop the plane under Terry, Fulton County police who were notified by radio to hold the plane for Alabama authorities also had sufficient reason to effect a Terry stop." (Emphasis supplied.)

Returning to the Anniston Airport, I observe that it 7
was the FAA Traffic Control Specialist, Mr. Bennett, whose "suspicion" was aroused and not the suspicion of the police. Mr. Bennett stated: "It wasn't so much that the aircraft did not call me. However, that was a contributing factor. The main thing that really aroused my suspicions was when it was confirmed that it was this World War II-type aircraft, which we have been instructed to be on the lookout for. This was what confirmed my suspicions and led me to picking up the telephone and calling the police. The other circumstances, such as how fast he might have been going, was just a contributing factor. . ." Mr. Bennett admitted that the aircraft was not required by any rule, regulation or law, to call him.

When the police arrived at the airport they reported to the terminal and Mr. Bennett directed them to the aircraft which had parked on the "ramp underneath the only burning white light that we have." Mr. Bennett observed ". . . one figure disembarked from the aircraft and went out to the police and apparently held some conversation with them . . . the figures turned and one went back toward the aircraft . . . [Mr. Bennett] reentered the building . . . [and] heard the aircraft engine start . . . saw it taxi rapidly to the end of the runway without any run-up procedure and immediately start taking off." He also stated that it was a "pilot option" to use a "rolling takeoff" as opposed to a "dead stop" takeoff.

Officer Hudson of the Oxford Police Department of Anniston, Alabama, was the policeman who responded to the FAA call. He was asked: "What call did you receive? A. That an airplane had landed without authorization." He was directed to the airplane and testified: "When we got out of the car, a white male approached me on the passenger side of the car and asked me where he was, and I told him he was in Oxford, Alabama. At that time he said he was bound for Atlanta, Georgia from Miami, Florida, and that his instruments had been knocked out in the rainstorm earlier that night." There were three other officers at the scene. He returned to his radio to see if FAA officials were going to meet with him about the unauthorized landing. At that time the "white male" and the three police officers returned to the plane. Officer

8 Hudson then went up to the door and tried to open it and when the right engine started, moved away and shouted to the pilot to stop and get out of the plane. The other police officers were just watching. The pilot started the second engine and taxied down the taxi strip. Hudson returned to his police car, outside the fence, and drove after the airplane with his blue lights on, but "[b]y the time [they] got to a place where [they] could cross and get on that runway [which the plane was on], the plane was already off the ground." Officer Hudson now knows that FAA authorization was not required to land.

From the above facts it is evident that not only did *the police* in Anniston, Alabama, not have "articulable suspicion that contraband was present," they *had no suspicion* of any activity other than someone had made "an unauthorized landing." Further, the FAA official was the only individual who had any "suspicion," and he is correct in his terminology. It was only "suspicion." The next important step is that, in effect, *a Terry stop occurred with defendant's plane and its personnel while it was in Anniston, Alabama*, and the personnel in the airplane explained why they were there.

In sum, the Anniston police basis for their Terry-type "stop" was based solely on the "suspicion" of an FAA employee, which was not communicated to the police. "Mere unconfirmed suspicion is not the criteria upon which probable cause is based." United States v. Jackson, 533 F2d 314 (5th Cir. 1976) The police were given the spurious offense of "unauthorized landing" as a subterfuge for a Terry-type 'stop" because they did not have "specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant[ed] that intrusion." Terry v. Ohio, 392 U. S. 1 (1968 SC 1868, 20 LE2d 889). Regardless of the basis used, the Terry-type "stop" occurred and the explanation was given and the defendant departed. Any attempt by the Anniston police thereafter to stop the defendant from departing was based solely on their false belief that defendant had committed a violation of FAA origin called "unauthorized landing."

Not only was the basis of the stop false, and based upon "suspicion" alone, without any "articulable facts"

relating to drug trafficking, which was not relayed to the 9
arresting officers in Anniston or Fulton County, but the premise of the majority that the Anniston officials' right to make a Terry-type *"stop"* would be sufficient to permit the Fulton authorities to make a Terry-type "stop." ignores the fact that Fulton authorities — in effect, were directed to *make an arrest*, not a stop. Lieutenant Deariso of the Fulton County Police Department testified they were "asked to hold the plane for authorities in Alabama." When questioned as to what he intended to do, he testified: "Q. Even before you directed Mr. Franklin to get out of the cockpit of the airplane, before he even came up to a stop at the cars, you had planned to get him out and hold him, had you not sir? A Yes, sir. Q. Regardless of whatever facts you might have seen or heard or smelled or what-have-you, you were going to — you had pre-planned what you were going to do? A. We intended to try to hold him for the Alabama authorities, yes, sir."

It is crystal clear that the "hold" order of "Alabama authorities" was an arrest order and not a Terry-type "stop" that previously had been carried out. Even if — as the majority states, the Fulton County Police had authority to make a Terry-type "stop," what were they supposed to do? What questions were they going to ask? No facts had been communicated to them. This was not a request to make a Terry stop but an arrest order and the Fulton County Police carried out an illegal arrest of the defendant for a nonexistent crime of "unauthorized landing." Further, I have searched the record and can find no mention of Alabama *police* authorities making any request to arrest the defendant. What I did find was that the Anniston FAA official called Birmingham, and Birmingham in turn called the Atlanta Air Route Traffic Control office. The only evidence in the record showing communications between Alabama and Georgia was in FAA channels.

The next question is when was the arrest effected? This is the issue that particularly concerns me. What effect will this "whole court" opinion have on the law of search and seizure? The majority opinion has placed the time at when a stop becomes an arrest at a period of time too long after the original stop to justify searches formerly

thought to be legal.

It is "horn-book" law that a lawful search may be made following a lawful arrest. Our Code states that "[i]f the defendant voluntarily submits to being considered under arrest . . . the arrest is complete." Code § 27-201. Here the order to stop and hold the defendant for "Alabama authorities," was an arrest order. The arrest was complete the instant "the liberty of another to come and go as he pleases is restrained, no matter how slight such restraint may be." *Caito v. State*, 130 Ga. App. 831 (1) (204 SE2d 765).

Our Supreme Court has discussed this issue as follows: "An arrest is accomplished whenever the liberty of another to come and go as he pleases is restrained, no matter how slight such restraint may be. The defendant may voluntarily submit to being considered under arrest without any actual touching or show of force, and the arrest is complete. [Cits.] The mere fact that the officer testifying with regard to these occurrences stated at one place in his testimony that after he had completed the search he 'then placed him under arrest' does not alter the fact that the defendant was actually under arrest from the moment the police officers approached the automobile which he was driving and caused him to alight therefrom under the force and restraint of drawn guns," as in this case. *Clements v. State*, 226 Ga. 66, 67 (2) (172 SE2d 600); *Strong v. State*, 231 Ga. 514, 518 (202 SE2d 428); *Holtzendorf v. State*, 125 Ga. App. 747, 750 (188 SE2d 879); *Brooks v. State*, 129 Ga. App. 109, 110 (198 SE2d 892); *Flournoy v. State*, 131 Ga. App. 171 (2) (205 SE2d 473); *Hill v. State*, 140 Ga. App. 121, 124 (230 SE2d 336).

Not only has the majority opinion not followed prior decisions of this court but the result reached is contrary to the holdings of our Supreme Court in *Clements* and *Strong* supra. If these cases did not provide sufficient precedent we should have turned to the U. S. Supreme Court's holding in Henry v. United States, 361 U. S. 98 (80 SC 168, 4 LE2d 134), where federal officers investigating suspected criminal activity observed what they thought to be contraband in a car. When the car departed, "the agents followed it and finally, when they met it, waved it to a stop." Id. at 99. The court held " . . . the arrest took

place when the federal agents stopped the car." Id. at 103. Other federal courts apply the same rule. In Carpenter v. Sigler, 419 F2d 169 (8th Cir. 1969), the court held the defendant "was 'seized' when the police officers signaled him to pull to the curb by the use of their flashing red light." Id. at 171. See also United States v. Nicholas, 448 F2d 662 (8th Cir. 1971).

In this connection the U. S. Supreme Court has held that "[t]he Fourth Amendment [prohibition against unreasonable searches and seizures] applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." United States v. Brignoni-Ponce, 422 U. S. 873 (95 SC [illegible] LE2d 607). Thus whether we categorize this stop as a "seizure" or an "arrest" it is immaterial if probable cause is lacking.

If we assume that the request to "hold" the defendant was relayed by Alabama police authorities, the U. S. Supreme Court dealt with a similar situation in Whiteley v. Warden, 401 U. S. 560 (91 SC 1031, 28 LE2d 306), wherein a sheriff, acting on a tip from an informer, made out a complaint against the defendant and another person charging them with burglary. A police radio bulletin named and described the defendant, the car he was driving, and the amount and type of money taken. Relying on the radio bulletin, a police officer in another county made a warrantless arrest of the defendant — as was done in this case. The court concluded that the officer who received the radio bulletin was "entitled to act on the strength of the radio bulletin . . . [as] officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest. In sum, the complaint on which the warrant issued here clearly could not support a finding of probable cause by the issuing magistrate. The arresting officer was not himself possessed of any factual data tending to corroborate the

12 informer's tip that [the defendants] committed the crime. Therefore [defendant's] arrest violated his constitutional rights under the Fourth and Fourteenth Amendments; the evidence secured as an incident thereto should have been excluded from his trial." Id. at 568-569.

In essence, the court held that an arresting officer is entitled to act upon receipt of a radio bulletin, but the validity of his act depends upon the validity of the initiating officer's acts. If the initiating officer had the right to make an arrest, he could properly delegate the arresting function via the radio bulletin to a fellow police officer to make the arrest. United States v. Gaither, 527 F2d 456 458 (6) (4th Cir. 1975); United States v. Robinson, 536 F2d 1298, 1300 (9th Cir. 1976); see also *Brisbane v. State*, 233 Ga. 339, 343 (211 SE2d 294); *Phillips v. State*, 233 Ga. 800 (213 SE2d 664); *Creecy v. State*, 235 Ga. 542 (221 SE2d 17). In this case the initiating officials had no basis for issuance of an arrest order, particularly for drugs.

In summary, the instant case follows one mistake upon another. First, there was no "founded suspicion" or "specific articulable facts" to base a Terry-type stop - only "suspicion." Second, only the FAA official had any "suspicion." Third, that "suspicion" was not communicated to the police. Fourth, a spurious offense that never existed was communicated to the police to make a "Terry-type" stop. Fifth, a "Terry-type" stop was made in Anniston, Alabama, and the police were given the reasons for their presence at that airport. See Adams v. Williams, 407 U. S. 143, 146 (92 SC 1921, 32 LE2d 612). Sixth, the attempt to stop defendant from leaving the Anniston airport was based on the nonexisting offense of "unauthorized landing." Seventh, there is no evidence that Alabama police authorities issued the "stop" and "hold" order. FAA officials in Alabama communicated with Georgia FAA officials. Eighth, Fulton County officials were directed to arrest the defendant — not to make a Terry-type stop. Ninth, regardless of directions from "Alabama authorities," the defendant was arrested at that point in time where the police blocked his path with police cars, stopped his airplane, exhibited two shotguns, and ordered him to leave the airplane. Henry v. United States, 361 U. S. 98, 103, supra; Beck v. Ohio, 379

U. S. 89, 91 (85 SC 223, 13 LE2d 142); Terry v. Ohio, 392 13
U. S. 1 (88 SC 1868, 20 LE2d 889); *Clements v. State*, 226 Ga. 66, 67, supra; *Strong v. State*, 231 Ga. 514, 518, supra. The arrest being without probable cause, the search that followed was illegal.

I would reverse.

SHULMAN, Judge, dissenting.

I respectfully dissent. The point at which I must depart from the majority is the holding that appellant was not arrested until the police spotted marijuana inside the plane. In my view, the arrest occurred earlier when police blocked the taxiway and, armed with shotguns, ordered appellant to shut down his engines and leave the aircraft. As Judge Goldberg stated in his excellent dissent in United States v. Worthington, 544 F2d 1275 (5th Cir., 1977), cited by the majority in this case, ". . . when a police-citizen confrontation is accompanied by a greater degree of force and restraint directed toward the citizen than is ordinarily or necessarily associated with a policeman's request to stop and answer some questions, it becomes the type of seizure that must rest on antecedent probable cause, whether or not it is within the traditional definition of arrest. From that perspective, I conclude that the seizure here required the traditional probable cause basis." At 1282.

The majority addresses this issue by citing Worthington, supra, and United States v. Maslanka, 501 F2d 208 (5th Cir., 1974). In the first place, this court is not bound by precedent from the U. S. Court of Appeals; they are merely persuasive. Second, I am convinced that Judge Goldberg's analysis in Worthington is correct and that of the majority incorrect. Third, the question of the degree of force used was not directly addressed in the body of the opinion in Maslanka. In the footnote cited by the majority here, the court noted that the arresting officer was alone on a country road with three men he had chased at speeds around 100 mph. In addition, the court noted, he had probable cause to arrest the driver, at least for speeding, and did so prior to the discovery of marijuana.

The facts in Worthington are also much different from those here. There, agents were informed that a young man was going to transport drugs in a particular plane during a specified time period. Pursuant to that tip, several details of

which had been verified, the agents followed Worthington for more than one day, bugged his plane, and finally confronted him when both planes were forced down by bad weather. In the instant case, the arresting officers knew nothing about appellee's activities, just that Alabama officials wanted him held. They saw a plane land, blocked its movement completely and confronted appellant with the threat of deadly force for the avowed purpose of "holding him for Alabama." I cannot accept that this procedure is consistent with a Terry investigative stop. With no information as to why they were acting, police officers armed with shotguns took custody of the appellant to "hold" him. That was an arrest and, since it preceded the discovery of the contraband, was not based on probable cause and was, therefore, illegal, requiring the suppression of the evidence seized. While the hands of the police should not be tied under clearly definable circumstances, reasonable and justifiable limitations should be applied.

I would reverse.

APPENDIX C

EXTRACTS FROM THE TRANSCRIPT OF EVIDENCE

CROSS-EXAMINATION OF LT. ROBERT DEARISO

BY MR. SIEFFERMAN:

* * *

Q For what reason did you block the taxiway at Charlie Brown Airport as this airplane was taxiing up the taxiway?

A We was requested to hold the plane for the Alabama authorities, sir.

Q For what reason?

A I don't know, sir.

Q So you didn't know why you were doing it except that you were told to hold the airplane?

A That's right, sir. We were honoring a request from Alabama authorities to hold the plane.

Q You didn't know if you were asked to hold it because maybe some occupant of the airplane had a sick child in Alabama or what?

A No, sir, I didn't. (Tr. 41-42)

* * *

RE-CROSS EXAMINATION OF LT. ROBERT DEARISO

BY MR. SIEFFERMAN:

Q All right. Even before you direct Mr. Franklin to get out of the cockpit of the airplane, before he even came up to a stop at the cars, you had planned to get him out and hold him, had you not, sir?

A Yes, sir.

Q Regardless of whatever facts you might have seen or heard or smelled or what-have-you, you were going to — you had pre-planned what you were going to do?

A We intended to try to hold him for the Alabama authorities, yes, sir. (Tr. 49)

* * *

THE COURT: . . . I don't think there was enough information to issue a warrant for the Atlanta Police or for the Anniston, Alabama Police. (Tr. 64)

Supreme Court, U. S.
FILED
MAR 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-805

CALVIN C. FRANKLIN,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

BRIEF OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-805

CALVIN C. FRANKLIN,
Petitioner,

vs.

STATE OF GEORGIA,
Respondent.

BRIEF OF RESPONDENT

QUESTIONS PRESENTED

Respondent cannot agree with Petitioner's statement of the questions presented to this Court. Petitioner fails to consider the issues in fact appealed to and decided by the Georgia Court of Appeals. Furthermore, he fails to note that other issues were expressly abandoned. Respondent would restate the questions presented by this petition as follows:

I. DID POLICE OFFICERS HAVE SUFFICIENT REASON TO DETAIN PETITIONER IN A *TERRY* TYPE STOP?

II. DID PETITIONER'S ARREST OCCUR AFTER POLICE SAW THE MARIJUANA IN PLAIN VIEW?

STATEMENT OF FACTS

On the 20th day of June, 1976, at 11:45 p.m., Air Traffic Control Specialist W. R. Bennett was on duty at the Anniston Municipal Airport, Anniston, Alabama (ST* 4; 6). A World War II vintage aircraft (A Lockheed Lodestar) came in for a landing (ST 6; 8). It was the type of aircraft he had been instructed to look out for (ST 8). He attempted to contact the aircraft on the standard frequency, but there was no response (ST 7). In the 20 years the air traffic controller had worked at the Anniston Airport (ST 10), there "wouldn't be one out of a hundred that would land without contacting us for services that we provide. Additionally, on that particular night, the weather was of such a situation that it was very close to being what we call instrument-type weather, in which case the aircraft would have been required to contact us" (ST 7).

Petitioner's aircraft aroused Mr. Bennett's suspicions because (1) there were no communications prior to landing, (2) it went abnormally fast when it approached the end of the runway, (3) it was unusual for Petitioner's type of aircraft to land at the airport, and (4) it was the type of aircraft they had been instructed to look out for (ST 6-11; 17). He called the Oxford Police Department and reported a suspicious aircraft (ST 9).

Officer Steve Hudson answered the call (ST 27-28). Petitioner's partner left the aircraft and asked the officer where they were. He told Officer Hudson that they were enroute from Miami to Atlanta. When the officer went back to his vehicle to use the radio, Petitioner's partner boarded the aircraft (ST 29-30).

*"ST" refers to suppression hearing transcript—see Appendix B.

Officer Hudson ran to the aircraft and tried to open the door. He shouted at Petitioner and told him to get out of the aircraft. Petitioner ignored him and started the engines (ST 30-31). Without going through the aircraft checklist, which includes a time consuming magneto check (ST 13), Petitioner and his co-pilot began to taxi. The officer ran to his squad car (ST 31).

Two police cars with blue lights flashing drove parallel to the aircraft and attempted to stop it (ST 13; 33). The aircraft took off and Petitioner escaped into the dark night sky (ST 12).

Anniston Airport authorities notified Birmingham Control, an FAA facility, to pick up Petitioner's aircraft on radar. Birmingham in turn advised Atlanta Air Route Traffic Control to do likewise (ST 16).

Lt. Robert Deariso of the Fulton County Police Department, Atlanta, Georgia, went to Charlie Brown Airport to back up one of his men. They had received word to hold an aircraft for Alabama authorities. On the way to the airport, Lt. Deariso was advised that the aircraft had dropped off of the Atlanta Hartsfield Airport radar and appeared to have landed (T. 36-37; 42).

Officers arrived at the airport. Petitioner's aircraft made a low sweep and landed. Officers blocked the aircraft with their vehicles and told Petitioner to leave the aircraft (ST 37-38). Although they had shotguns, they did not point them at Petitioner (ST 43).

As Petitioner left the aircraft, Lt. Deariso saw "large croaker sacks" in the lighted aircraft (ST 39). The odor of marijuana wafted from the aircraft. It was "very strong" (ST 40; 44). Marijuana was scattered on the floor of the aircraft (ST 40; 41). Officers led Petitioner away to one

of the squad cars (ST 45).

Officers entered the aircraft to see if anyone else was in there (ST 40; 45). Officer Gordon had to climb over the sacks to get to the cockpit. Loose marijuana was everywhere. The officers scooped it up in "big handfuls". (ST 41; 45; 47). The aircraft contained one-and-a-half tons of marijuana.

ARGUMENT

I.

POLICE OFFICERS HAD SUFFICIENT REASON TO DETAIN PETITIONER IN A *TERRY* TYPE STOP.

Fulton County Police Officers in Atlanta, Georgia, detained Petitioner pursuant to a hold order from Alabama authorities. Here, the question is, did Alabama authorities have sufficient articulable facts within their knowledge to create a reasonable suspicion that Appellant was engaged in criminal activity so as to justify an investigatory stop? If the answer to this question is "No", Alabama authorities should not have issued a hold order to Atlanta and the Fulton County Police Officer's investigatory stop must fall. On the other hand, if Alabama officers had justification to momentarily detain Petitioner, the Atlanta stop was authorized.

The courts have stated that where there are reasonable articulate grounds for suspicion, the State's interest in the maintenance of community peace and security outweigh the momentary inconvenience and indignity of an investigatory stop. *U.S. v. Worthington*, 544 F.2d 1275, 1279 (5th Cir. 1977), *cert. denied*, ____U.S.____ (No. 76-1298, Oct. 3, 1977); *U.S. v. Robinson*, 535 F.2d 881, 883 (5th Cir. 1976); *Brisbane v. State*, 233 Ga. 339, 343 (1974).

In the instant case, the following articulable facts known to Alabama authorities gave rise to their attempted investigatory stop and subsequent hold order to Atlanta authorities.

1) Petitioner flew a Lockheed Lodestar World War II vintage aircraft. A lookout had been placed on this type of aircraft (ST 8-9);
2) It was unusual for aircraft of the type Petitioner was flying to land at the Anniston Airport (ST 17);
3) Air Traffic Control Specialist Bennett, who had worked at the Anniston Airport for 20 years, said 99 out of 100 aircraft contact the facility before landing, especially when it is "very close" to "instrument-type weather" (ST 4; 6-7; 10);
4) Petitioner's aircraft went faster than normal on the ramp after it left the runway (ST 9);
5) After Petitioner's co-pilot talked with Officer Hudson, he quickly boarded the aircraft when the officer used his police radio. He refused to open the hatch for the officer and ignored the officer's shouts to disembark (ST 30; 31);
6) When the officer ordered Petitioner and his co-pilot to leave the aircraft, they ignored him, rapidly taxied, and took off without going through the customary, time-consuming aircraft checklist (ST 12; 13);
7) Petitioner ignored the two police cars, with flashing blue lights, which drove parallel to the aircraft, and taxied and took off into the darkness (ST 12; 13; 33).

There was no legitimate or logical explanation for Petitioner's behavior. The articulable facts known to the Alabama officers and the rational inferences drawn from the facts were sufficient to create a reasonable suspicion

that criminal activity was in progress. It was more than a hunch. Hence, the attempted stop by Alabama authorities was authorized by law. *Terry v. Ohio*, 392 U.S. 1, 27, 30 (1968); *U.S. v. Worthington*, 544 F.2d 1275, 1279-1280 (5th Cir. 1977), *cert. denied*, ____ U.S. ____, (No. 76-1928, Oct. 3, 1977); *Cook v. State*, 136 Ga. App. 908, 909 (1975).

The Fulton County Police Officers were asked to hold Petitioner's aircraft for Alabama authorities. They were entitled to act on the strength of the hold order from the Alabama authorities. *accord*, *Whiteley v. Warden*, 401 U.S. 560, 568 (1971); *Silas v. State*, 133 Ga. App. 560 (1974); *Quinn v. State*, 132 Ga. App. 395 (1974). By reason that Alabama authorities had the requisite reasonable suspicion to stop Petitioner, the hold order under which Fulton County officers acted, as a virtual extension of the Alabama police officers, was valid and the stop was lawful.

II.

PETITIONER'S ARREST OCCURRED AFTER POLICE SAW MARIJUANA IN PLAIN VIEW.

Blocking a highly mobile aircraft with vehicles, while armed, is not automatically an arrest. At times it is necessary for an officer to approach a suspiciously dangerous situation with a drawn weapon in order to protect himself and the public. The United States Fifth Circuit Court of Appeals recently stated:

> "We agree with the trial court and reject Appellant's contention that a full-blown arrest occurred at the precise moment that the Customs plane was positioned in front of Appellant's plane, and Customs agent Williams emerged with gun and flashlight in hand. We hold that the stop was made in an acceptable manner under the circumstances present. Blocking the plane was a reasonable manner in which to effect the stop and maintain the *status quo*. An investigatory stop is not automatically an arrest simply because an officer draws his gun. See *United States v. Maslanka*, *supra*, 501 F.2d at 213, n. 10. From following Appellant during his inexplicable flights, and based upon their experience with drug traffickers, the agents reasonably feared death or serious injury "when they stopped and approached Appellant's plane on the dark, deserted airstrip. Carrying a drawn gun was reasonable under the circumstances." *U.S. v. Worthington*, 544 F.2d 1275, 1280 n. 3 (5th Cir. 1977), *cert. denied*, ___U.S.___ (No. 76-1298, Oct. 3, 1977).

The officers in the instant case merely held shotguns, they did not point them at Petitioner. This action is certainly less offensive than that approved in *Worthington* where a high powered rifle was aimed at the pilot.

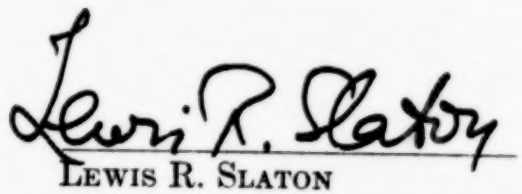
The time an arrest occurs is a question of fact. It depends on evaluation of the testimony of those present at the time. *U.S. v. Worthington*, 544 F.2d 1275, 1279 (5th Cir. 1977), *cert. denied*, ___U.S.___ (No. 76-1298, Oct. 3, 1977). In a Motion to Suppress the judge sits as the trier of fact. *State v. Smith*, 134 Ga. App. 602 (1975). The credibility of the witness is for his determination. *Simmons v. State*, 111 Ga. App. 553, 544 (1965). His judgment should not be disturbed by a reviewing court if there is any evidence to support it. *West v. West*, 228 Ga. 397, 398 (1971); *Brisendine v. State*, 130 Ga. App. 249, 250 (1973).

In the case *sub judice* there is evidence to support the trial judge's finding that an arrest did not occur until the police saw the marijuana in plain view as Petitioner emerged from the aircraft (see Statement of Facts).

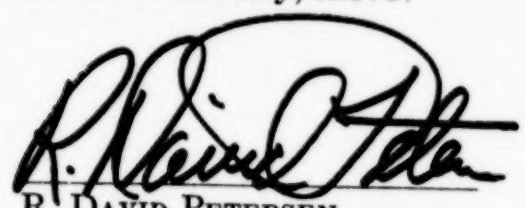
CONCLUSION

By reason that (1) officers had sufficient reason to detain Petitioner in a *Terry* type stop, and (2) Petitioner's arrest did not occur until police smelled and saw marijuana in plain view as Petitioner emerged from the aircraft, the writ of certiorari to the Georgia Court of Appeals should be denied.

Respectfully submitted,



LEWIS R. SLATON
District Attorney, A.J.C.



R. DAVID PETERSEN
Assistant District Attorney
Counsel for Respondent

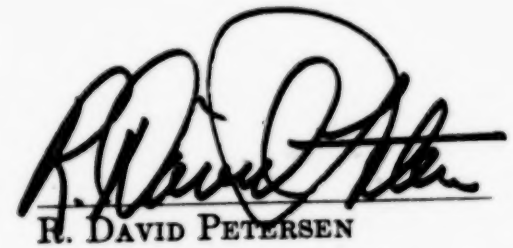
THOMAS W. HAYES
Assistant District Attorney

CERTIFICATE OF SERVICE

GEORGIA
FULTON VOUNTY

I, R. David Petersen, of counsel for the State of Georgia, Respondent in the foregoing case, certify that I have this day served a copy of the foregoing upon Counsel for Petitioner by placing same in the United States Mail, postage prepaid and properly addressed.

March 3, 1978.



R. DAVID PETERSEN
Counsel for Respondent

Appendices

APPENDIX A

In the Court of Appeals of Georgia

C. F. FRANKLIN

v.

The STATE

No. 53600

BANKE, Judge.

The defendant was indicted for violation of the Controlled Substances Act after being found in possession of nearly three thousand pounds of marijuana. The defendant moved to suppress the evidence as the fruit of an illegal arrest. He now appeals from the trial court's dismissal of his motion to suppress.

The defendant was the pilot of a plane which was importing marijuana into the United States. The plane became lost in bad weather and landed at Anniston, Alabama. Before leaving the Anniston airport, the defendant aroused the authorities' suspicion as to the nature of his cargo, and local police attemped unsuccessfully to stop him before he hastily returned to the skies, bound for Atlanta.

Georgia authorities were notified of the plane's approach, and a radio call went out to Fulton County police officers near the Charlie Brown Airport to hold the plane for authorities in Alabama.

Police officers arrived at the airport moments before the defendant's plane landed, blocked the taxiway, and, armed with shotguns, awaited the defentant's arrival. When the defendant landed and neared their cars, he was ordered to get out of the plane. While he was doing so,

officers saw the marijuana inside the plane and according to their version of the facts, arrested the defendant at that time.

The defendant contends that when his vehicle's motion was blocked by police cars and he was accosted by officers armed with shotguns an arrest had already occurred. It is the State's contention that the defendant was not arrested until *after* the officers saw his cargo and that the armed blockage of the taxiway amounted merely to an "investigatory stop," as allowed by *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Because probable cause for an arrest did not exist until the marijuana was actually spotted inside the plane, we must determine whether sufficient evidence existed for a determination by the trial judge that the defendant's initial confrontation with the police was in the context of a *Terry* stop.

1. The defendant landed in Anniston in a World War II vintage aircraft of a type known to be regularly used in drug trafficking. He landed without contacting the control tower, as is customary, and drove his aircraft much faster than is normal on the ramp. He refused to disembark from the plane when asked to do so by Anniston police and took off rapidly, without going through the customary aircraft pre-flight checklist. Based on these observations, Anniston police had an articulable suspicion that contraband was present in the aircraft and thus had the right to detain the defendant for questioning under *Terry*.

The defendant's plane was followed on radar from Anniston to Atlanta. As Fulton County policemen were approaching Charlie Brown Airport, they were notified by radio that the aircraft had dropped off radar at Hartsfield Airport and appeared to have landed. An officer arrived at the Charlie Brown Airport to see a plane make

a low sweep without setting down. There is evidence from which the trial judge could find that the defendant's aircraft was sufficiently determined by Fulton County police to be that which departed from Anniston. Because Anniston officials had sufficient cause to stop the plane under *Terry*, Fulton County police who were notified by radio to hold the plane for Alabama authorities also had sufficient reason to effect a *Terry* stop. *Silas v. State*, 133 Ga. App. 560, 211 S.E.2d 609 (1974); *Quinn v. State*, 132 Ga. App. 395, 208 S.E.2d 263 (1974).

2. Time of arrest is a question of fact which depends upon an evaluation of the testimony by the trial judge. *Rios v. United States*, 364 U.S. 253, 262, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (1960). There is evidence to support the trial judge's finding that an arrest did not occur until the police saw marijuana in plain view. "Factual and credibility determinations of this sort made by a trial judge after a suppression hearing must be accepted by appellate courts unless such determinations are clearly erroneous. See *Lego v. Twomey*, 404 U.S. 477, 92 S.C. 619, 30 L.Ed.2d 618 (1972), and *United States v. Watson*, 469 F.2d 362 (5th Cir. 1972)." *Johnson v. State*, 233 Ga. 58, 209 S.E.2d 629 (1974).

Blocking the plane with police cars was a reasonable manner of stopping it under the circumstances, considering the possibility of flight by the defendant in a highly mobile aircraft. An investigatory stop is not automatically an arrest simply because an officer is armed with a shotgun. *United States v. Worthington*, 544 F.2d 1275 (5th Cir. 1977); *United States v. Maslanka*, 501 F.2d 208, 213 n. 10 (5th Cir. 1974). It is often necessary for the police to approach a person with a drawn weapon in a suspiciously dangerous situation in order to protect the

physical well-being of both police officers and the public. In fact, in a situation very similar to that sub judice, the United States Court of Appeals for the Fifth Circuit recently held that officers acted reasonably in stopping a pilot suspected of transporting marijuana by blocking his plane and ordering him at riflepoint to disembark. *United States v. Worthington*, supra. The Officers' actions in the case at bar in merely holding shotguns is certainly less offensive than in *Worthington*, where a high-powered rifle was aimed at the pilot.

The Fourth and Fourteenth Amendments to the Constitution prohibit only *unreasonable* searches and seizures. Is a seizure unreasonable simply because the police have taken the precaution to arm themselves in light of unknown danger? We are not prepared so to hold. If we were to reach a contrary result, law enforcement officers would be required to risk their lives by not drawing weapons until drawn upon, unless a hasty legal analysis convinced them that probable cause existed for an arrest.

From *Holtzendorf v. State*, 125 Ga. App. 747, 750, 188 S.E.2d 879, 881 (1972), the defendant quotes, "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." With this statement we have no quarrel; the defendant was "seized" by Fulton County officers when his aircraft's passage was blocked. The *Holtzendorf* quote was taken verbatim from *Terry v. Ohio*, supra, another case where a defendant was seized. However, the court in *Terry* proceeded to hold that the seizure was not unreasonable under the Fourth Amendment—as we have done here. Therefore, the quote from *Holtzendorf* does not support the defendant's contention that he was necessarily illegally arrested.

The holding of this court in *Kelly v. State*, 129 Ga. App. 131, 198 S.E.2d 910 (1973), does not conflict with our finding that no arrest occurred prior to discovery of the marijuana. In Division 2 of *Kelly* this court simply held that there was no "articulable suspicion" to support a *Terry* stop of the defendant's automobile.

Judgment affirmed.

APPENDIX B

EXTRACTS FROM THE TRANSCRIPT OF EVIDENCE

W. R. BENNETT,

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HAYES:

Q State your name, please, sir.

A My name is W. R. Bennett.

Q By whom are you employed?

A I am employed by the Federal Aviation Administration.

Q In what capacity?

A I am an Air Traffic Control Specialist.

Q All right, sir. Was that your employer and was that your area of expertise back on the 20th of June, on or about the 20th of June, 1976?

A Yes, sir.

Q Where do you perform these duties for the FAA?

A In the terminal building at the Anniston Municipal Airport, Anniston, Alabama.

Q All right, sir. Directing your attention back to that date, what services were you—were you on duty on that date to begin with?

A Yes, sir.

Q What services were you providing basically?

A The normal range of the flight service facility,

which includes airport advisory with aircraft which have established two-way radio communications with us.

Q All right, sir. What is the nature of that airport there? Can you tell us or tell His Honor what control or what jurisdiction you have over the aircraft involved at that particular airport?

A Yes, sir. The Anniston Municipal Airport is an uncontrolled airport in this respect, that it does not have a control tower. Now our airport advisory system that we give in the nature of wind velocity, altimeter settings, the favored runway in use is on a voluntary basis. The other duties that we have are pre-flight pilot briefing, handling of weather pilot reports, and teletype duties.

Q All right, sir. What were your duty hours on or about this date I have—

A They were from four p.m. until midnight.

Q All right, sir. During that particular duty, toward the close of your duty, around midnight, did you have occasion to have your attention drawn to a particular aircraft there at the airport?

A Yes, sir, I did.

Q Would you explain to His Honor under what circumstances your attention was drawn to that particular aircraft?

A Yes, sir. At about 15 minutes until midnight I observed an aircraft pass by the window on the runway, and I could tell that it was a fairly large aircraft because of the position of the wing lights; also I could tell that it was an aircraft with conventional landing gear. That is one with a tail wheel as opposed to one with a nose wheel. At that time I did not know what type aircraft it was. I

assumed it to be either a twin Beechcraft or Lockheed. After the aircraft turned off at the end of the runway, I took our binoculars that we are provided with, and it, indeed, turned out to be a Lockheed-type aircraft.

The aircraft parked on the fixed base operator's ramp underneath the only burning white light that we have, and at that point, I observed the aircraft with the binoculars. The pilot slid the window open on the left side, but did not leave the aircraft. One other occupant did leave the aircraft.

Q Was there anything unusual about the manner in which the plane landed there that night?

A Yes, sir, in my estimation, there was. I had no communications with the aircraft prior to its landing. The aircraft to me appeared to be moving quite fast at that point on the runway. Normally an aircraft would have slowed down pretty much before reaching the end of the runway.

Q All right. Did you attempt to make any contact with the aircraft by radio?

A To the best of my recollection, I attempted to reach the aircraft on frequency 123.6.

Q What is that, the standard one?

A Yes, sir, that's the standard frequency for airport advisory.

Q Were you successful in your attempt to reach the aircraft?

A No, sir.

Q Did the aircraft attempt or did it make any—initiate any contact with you by radio?

A No, sir.

Q Is there anything unusual about that circumstance?

A Yes, sir.

Q Would you explain to His Honor what is unusual about that?

A Well, nowadays, almost all aircraft are equipped with two-way radios, and I would say probably that there wouldn't be one out of a hundred that would land without contacting us for the services that we provide. Additionally, on that particular night, the weather was of such a situation that it was very close to being what we call instrument-type weather, in which case the aircraft would have been required to contact us.

Q All right, sir. Can you describe the aircraft in any more detail than you have to this point?

A Well, I remember that I could determine the colors of the aircraft after it parked under the light with the binoculars. The colors were blue and white, but I could not read the numbers because it didn't have its side in my direction, only the nose portion.

Q And what was—can you tell us the type of aircraft it was?

A Lockheed Lodestar.

Q And what is that generally used for?

A This is an aircraft that is of World War II vintage, and one that we have—this particular type we have been instructed to be observant for.

Q Who has instructed you to be observant of that particular type aircraft?

A As part of the duties of the FAA.

Q Well, your superiors have given you instructions to be on the lookout for that type of aircraft?

A We have instructions, yes, sir. We cooperate with law enforcement agents, narcotics bureaus, the FBI, and Coast Guard, whichever is required.

Q All right, sir. What is the nature of the instructions that you are given regarding these aircraft?

A We received these by teletype. It is more or less a lookout, similar to what you would have for automobiles. The numbers of aircraft that law enforcement agencies are interested in are transmitted to us and they are posted where we can see them.

Q Was this particular aircraft that landed there that night one of this type that you have been asked to be on the lookout for?

A The type, yes, sir.

Q All right, sir. What did you do after observing this aircraft land there in that fashion?

A I called the Oxford Police Department and advised them that we had an aircraft which probably needed checking out since it was of a suspicious nature.

Q Well, what did you find suspicious? What particular facts made that airplane suspicious to you?

A As I said previously, and landing rollout, plus the absence of any two-way communications; but most probably, the type of aircraft that it turned out to be.

Q Can you explain in a little more detail what you mean by landing rollout?

A Yes, sir. Normally an aircraft is slowed down quite a bit upon reaching the end of the runway. This aircraft in my estimation was still moving quite rapidly, and it seemed that upon coming into the ramp it was still in somewhat of a hurry.

Q All right, sir. You mentioned a moment ago that it would be as rare as one in a hundred planes that would fail to contact you for weather information—

A Yes, sir.

Q —that you provide there for planes that come in and out of that airport. What are the type of planes that don't request this sort of information?

A Most of them would be very small single engine aircraft not equipped with two-way radio or perhaps an agricultural-type aircraft.

Q How long have you worked there at Anniston Airport?

A Approximately 20 years.

Q Do you recall in your experience any aircraft of this size not seeking your assistance once landing there under those circumstances?

A Not unless it was an emergency.

Q All right, sir. Well, in the event of an emergency, once landed, did the individuals seek your assistance at that time?

A Yes, sir, I would think so.

Q And you called based on what you had observed there and your suspicions, you called the Oxford Police. Is that correct?

A Yes.

Q And what did you tell them?

A I told them that we had a large aircraft which had just landed and that I had no communications with it, and that it was of a type which we had been instructed to be on the lookout for, and I thought perhaps it should be checked out.

Q Instructions given to you for purposes of stolen aircraft, aliens and narcotics?

A That's right, the whole range of it.

Q All right, sir. Did the police then come?

A Yes, sir, they did.

Q What did you observe transpire? Let me ask you this first. Did you remain in your office there, your tower, your observation point?

A I did until they arrived because at first they came down to the building where I am rather than going to the ramp where the aircraft was; and I told them that the aircraft was at the opposite side of the airport, and they proceeded then to go back up to the ramp at that point. To answer your question, I went outside to use the binoculars because I could see better out there from the overhead lights.

Q And what did you observe?

A As I have already stated, the pilot, while I was watching him, did not leave the aircraft, but one other occupant did, and went out and met the officers and talked with them; and at this point, my relief appeared as his duty hours would start at midnight, and I was in the process of briefing him as to what I had observed; so part of the time, at this point I was outside the building.

Q All right. Was your attention once again directed toward that plane?

A Yes, sir. Upon briefing my relief, I went back inside the building and my relief was still standing outside, and he called me and told me—

MR. SIEFFERMAN: Your Honor, we would object to anything his relief might have told him. It's hearsay.

MR. HAYES: I won't insist on that.

Q (By Mr. Hayes) As a result of this call from your relief, did you take any action?

A Only when I saw the aircraft crank up.

Q All right. What did you do then?

A When it started its motor, I went back inside thinking perhaps it might call me for some type of airport advisory at this point.

Q Did it?

A No, sir.

Q All right, sir. What happened then?

A I observed the aircraft leave the fixed base ramp and taxi rapidly to the end of the runway, at which point it proceeded to make an immediate takeoff.

Q All right. Is there anything unusual about that?

A Yes, sir. Normally before departure, an aircraft pilot will go through a checklist; he has to check magnetos, and this requires some time depending upon the size and complexity of the aircraft.

Q Are you generally familiar with the particular aircraft we are talking about?

A I'm familiar to this extent, that it is a twin engine aircraft and rather large.

Q Are you familiar with the checklist, the items they have to go through to prepare that?

A Not on that particular aircraft, no, sir.

Q All right, sir. What happened? Did you observe anything else happen?

A Yes, sir. As the aircraft started its takeoff roll, the

two police cars with their blue lights on attempted to stop the aircraft. They were on the parallel taxiway. Our taxiway is the same length as the runway at Anniston. The aircraft was on the runway. The two police cars were for some—most of the time were abreast of the aircraft with their blue lights on. (ST 4-13).

(DIRECT EXAMINATION OF W. R. BENNETT (CONTINUED)

THE COURT: All right. Go ahead.

Q (By Mr. Hayes) Did the plane successfully take off?

A Yes, sir, it did.

Q What did you do at that time?

A At that point—we have inter-phone communications with Birmingham Approach Control, which is another FAA facility. I advised them of the circumstances which had transpired, and I asked them if they could pick up the aircraft on radar.

Q Did that pretty well conclude your involvement with this particular plane?

A The only thing I might possibly add was that Birmingham Approach Control on another inter-phone system advised the Atlanta Air Route Traffic Control, and they in turn activated their radar.

Q All right, sir.

MR. HAYES: I believe that is all I have at this time, Your Honor.

CROSS-EXAMINATION

BY MR. SIEFFERMAN:

Q Mr. Bennett, I have a relatively few number of

questions. How often do you have Learstars or Lodestars land at your Anniston Airport?

A We made a little survey on that a couple of months ago. We average about one a day, sometimes three a day.

Q So it's not all that unusual an event to have a Lodestar or Learstar conversion land at your airport?

A You asked me about a Learstar?

Q Yes, sir. Do you know what a Learstar is?

A Yes, sir, that's a jet.

Q No, sir. The Lear conversion of the Lodestar lengthens the fuselage a little bit.

A The modification, yes, sir. I understand. It is unusual for this type of aircraft to land there. They are just not that numerous anymore. Not that type. I misunderstood your question.

Q The Lodestar.

A I was thinking of the jet-type aircraft.

Q Oh, I see. You do understand, do you not, sir, that there are hundreds of active Lodestars in this country?

A I have no figures on that. I don't see that many. We don't see that many at Anniston. (ST 16-17).

OFFICER STEVE HUDSON,

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HAYES:

Q Were you sworn with the other witnesses?

A Yes, sir.

Q State your name, please.

A Steve Hudson.

Q And by whom are you employed now, sir?

A Calhoun County Sheriff's Department.

Q Back on the evening of the 19th-20th of June, by whom were you employed?

A Oxford Police Department.

THE COURT: Who police department?

THE WITNESS: Oxford.

THE COURT: Pull that microphone a little closer.

Q (By Mr. Hayes) Did you have occasion to answer a call out at the Anniston Airport on that particular evening regarding an airplane that landed there?

A Yes, sir.

Q Did you receive a call yourself? What call did you receive?

A That an airplane had landed without authorization.

Q And what did you do as a result of that?

A I was riding with Officer Prittchett and he and I responded to the call and met with—

Q Wait just a minute. I don't think His Honor can hear you. You are going to have to speak a little louder. He is whispering to us and I can't hear him.

THE COURT: All right, son. Keep whispering. We will hear you now.

THE WITNESS: Officer Prittchett and I responded to the call and met with the FAA official.

Q (By Mr. Hayes) What did you do after meeting with the FAA official?

A He pointed to the plane that he had called in about and advised us that that was the one that had landed. It was approximately 300 yards away from the point where he was standing at the time, and we went to that particular part of the airport then.

Q All right. What did you do upon arrival there?

A We had parked in the parking lot of the part of the airport there which is separate from the regular airport, Hendrix Aviation. When we got out of the car, a white male approached me on the passenger side of the car and asked me where he was, and I told him he was in Oxford, Alabama. At that time he said he was bound for Atlanta, Georgia from Miami, Florida, and that his instruments had been knocked out in the rainstorm earlier that night.

Q What other conversation did you have at that time?

A That was it to the best of my knowledge.

Q All right. What did you do then?

A I went back to the car and called the dispatcher to see if FAA officials was going to meet with us over there, and at the same time that I turned around and walked off, the white male—the other three officers on the scene walked around to the plane.

Q All right. Did you communicate with the FAA?

A Not personally. I believe the radio operator did.

Q Did they want to speak to the party?

A He at the time that I walked off, he hadn't got a hold of them yet.

Q When you walked away, what did you do? When you walked away from your car.

A We walked around to the other side of the building

where the plane was.

Q And what did you observe at that time?

A I observed the male, the white male that I had spoken with, getting on the airplane.

Q What did you do at that time?

A I ran up to the door and tried to open it and then tried to look in the window of the plane.

THE COURT: You lost me. You went back to your car to call the FAA. Is that what you said?

THE WITNESS: To call the dispatcher to get him to call the FAA.

THE COURT: Were other officers there talking to the white male when you did that?

THE WITNESS: Yes, sir.

THE COURT: The dispatcher couldn't get in touch with them and you left the car and walked back around the building. You were parked on the other side of a building from the airplane?

THE WITNESS: Right, sir.

THE COURT: After you did that, what did you see?

THE WITNESS: The man that I had had the conversation with was getting on the plane.

THE COURT: And where were the other three officers?

THE WITNESS: Two of them was standing to the left of the left wing, about ten feet out from the plane, and the other one was standing to the rear of the tail section of the plane.

THE COURT: All right. Go ahead.

Q (By Mr. Hayes) What happened then?

A The man had gotten on the plane. I tried to open the door.

Q Did you say anything to anybody there?

A I hollered at the pilot for him to get out of the plane.

Q What did you tell him, anything else?

A Not to him. He started the engine, the right engine about the same time.

Q Did you see him? How close were you to him?

A I'd say 20 feet.

Q What did he do, if anything?

A Turned and kind of gave a smile or frown.

Q And what did he do then?

A Started the right engine of the plane, then the left engine; and as soon as he got the left engine started, the plane began to taxi off.

Q All during the time were you shouting for them to stop and get out of the plane?

A Yes, sir.

Q And they ignored you?

A Right.

Q Were you within 20 feet of the plane?

A Yes, sir. (ST 27-31).

(DIRECT EXAMINATION OF OFFICER STEVE HUDSON CONTINUED)

A Right, had the blue lights on.

Q Is it just for one car or more than one car?

A No, sir. Officer Prittchett was in a car to the rear of mine.

MR. HAYES: He's with you.

CROSS-EXAMINATION

BY MR. SIEFFERMAN:

Q Officer Hudson, are you a licensed pilot?

A No, sir.

Q Is this correct, Officer Hudson, at no time did you observe that airplane or either of the individuals in it violate any law?

A Just failure to obey an officer. (ST 33).

LIEUTENANT ROBERT DEARISO,

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HAYES:

Q All right. You were sworn with the other witnesses, were you not?

A Yes, sir.

Q What is your name, sir?

A Robert Deariso.

Q By whom are you employed?

A Fulton County Police Department.

Q What capacity?

A As a lieutenant.

Q What was your assignment back on the evening of the 19-20 of June, 1976?

A Morning watch commander.

Q How long have you been a police officer?

A Since January, 1961.

Q All right, sir. Did you receive a call to the Charlie Brown-Fulton County Airport on this particular morning in question?

A One of my men received the call. I went to back him up on the call.

Q Did you hear the call at the same time?

A Yes, sir, I did.

Q What call did you receive?

A Heard this airplane was a few miles out, seemed to be approaching to make a landing at Charlie Brown Airport. We was asked to hold the plane for authorities in Alabama.

Q What did you do upon hearing that request to one of your men over the radio?

A I started toward the airport with it.

Q Did you receive any other information over the radio regarding this airplane during the time you heard that and proceeded to the airport?

A Yes, sir. We was advised he had dropped off radar from Hartsfield Airport and appeared to have landed before we got there, before I got there.

Q All right. Did you arrive there at the airport?

A Yes, sir. He made the plane, made a low sweep, but didn't actually set down the first time.

Q You saw the plane still in the air yourself?

A Yes, sir, I did.

Q What happened upon your arrival there? You just tell His Honor.

A The plane landed and we blocked the runway or the taxiway to prevent the plane from taking off, at which time he stayed at the end of the runway where he had turned around to come to the taxiway, and stopped. He didn't come up to our vehicles where we had the runway blocked. He sat approximately two minutes, and then came up to the vehicles.

Q What occurred then?

A The pilot of the plane opened a side cockpit window. We were standing on the runway with shotguns. I told him to cut his engines and come out of the plane. He hollered back something. I couldn't understand for the engines running. I told him to cut the engines and come on out of the plane. When he did, he cut his engines. I told him to come on out of the plane. So we started walking toward the back of the plane where the door was.

Q Who is we?

A Myself and Officer Tommy Gordon that was there. He is the one that received the call.

Q All right, sir. Where did you station yourself at the plane after you had told him to come out of the plane?

A I walked on around the tail of the plane and squatted down underneath the tail of the plane with the shotgun, and Officer Gordon come around the side of the plane facing the door straight on, 25 or 30 yards away from the plane.

Q How far away from the doorway of the plane were you?

A Oh, I'd say as far as from me to the front edge of your table there, if that far.

Q All right, sir. What occurred then?

A Mr. Franklin came out of the airplane, opened the door and came out of the airplane. And we told him to turn around and put his hands on the side of the plane. When he did, we searched him.

Q How did that door open?

A The door opens from the tail of the plane, swings forward toward the wing, and he come out of the plane. I had a good view of what was inside the plane as he came out.

Q Were the interior lights of the plane on at that time?

A Yes, sir, they were.

Q What did you observe?

A I observed large sacks appearing to be croker sacks of some type of material stacked in the plane.

Q Did you determine the color of the material stacked there?

A I didn't at that particular time. As we walked up to search Mr. Franklin, you could smell the odor of Marijuana very strong, and now as we removed Mr. Franklin, we entered the plane looking for other subjects, and you could see the Marijuana on the floor.

Q Did you enter the plane knowing whether anybody else was on the plane?

A No, sir, I didn't.

Q Was that your purpose in entering the plane?

A Yes, sir, it was.

Q When you told Mr. Franklin to stop there and put his hands up, did the door remain open?

A No, sir, the door closed all except for just a small crack, maybe two or three inches.

Q All right, sir. When you went up to observe Mr. Franklin or to pat him down, could you see into that crack in the door to the interior of the plane?

A Yes, sir, you could still see through the crack. Officer Gordon went up and patted him down. I didn't approach him at that time until after he had been patted down.

Q All right, sir. Was there anything that you could observe in the doorway of the—on the floor of the passageway there, the aisle?

A Yes, sir. As soon as you opened the door, it was a lot of loose Marijuana laying right on the floorboard. It was—as a matter of fact, they just scraped it up in big handfuls after we started unloading and put it back in the sacks.

Q You say you joined the force in '61?

A Yes, sir, January 1961.

Q Since that time have you had occasion to be around Marijuana?

A Yes, sir, I have, many occasions.

Q Are you familiar with its odor?

A Yes, sir, I am.

Q Was there any question in your mind at the time you smelled the material there that it was, in fact, Marijuana?

A No question at all, sir.

MR. HAYES: I believe that's all.

CROSS-EXAMINATION

BY MR. SIEFFERMAN:

Q All right. Are you a licensed pilot?

A No, sir.

Q For what reason did you block the taxiway at Charlie Brown Airport as this airplane was taxiing up the taxiway?

A We was requested to hold the plane for the Alabama authorities, sir.

Q For what reason?

A I don't know, sir.

Q So you didn't know why you were doing it except that you were told to hold the airplane?

A That's right, sir. We were honoring a request from Alabama authorities to hold the plane.

Q You didn't know if you were asked to hold it because maybe some occupant of the airplane had a sick child in Alabama or what?

A No, sir, I didn't.

Q Okay. Then you stretched a total of three police cars across the taxiway there at the airport?

A No, sir, we didn't; only two.

Q Only two?

A Yes, sir.

Q Which two?

A My car and Officer Gordon's car. Now there was a third car there, but it wasn't stretched across the runway. That was the security—Fulton County-Charlie Brown security car that was behind our two cars.

Q So you are saying that your two cars were across the runway, across the taxiway, however?

A Yes, sir.

Q And they effectively blocked the airplane so it couldn't go anywhere?

A That was our intention, to prevent him from taking off.

Q That was succeeded?

A Yes, sir.

Q Do you remember the pilot leaning out of the window and saying, why don't you just let me taxi on up to the ramp and I'll park it there?

A I remember him saying something. I couldn't understand what he was saying for the engines running, but I didn't want him to take the plane anywhere. I wanted him to leave it right there.

Q And you had, was it one or two shotguns pointed at him?

A I had a shotgun and Officer Gordon had a shotgun. There was two shotguns, but it was not pointed at him. We had them, holding them.

Q And you ordered him to get out of that airplane?

A Yes, sir.

Q And he obeyed?

A Yes, sir, he did.

Q Now he turned off the engines prior to getting out?

A That's correct, sir.

Q Now isn't it correct, sir, that the first time you had any idea what he might have had or what might have been in that airplane was after the engines had been shut

down and after Mr. Franklin got out the door and you were walking up towards Mr. Franklin?

A No, sir. The first idea is as he came out of the door and I saw what was in the plane; and then when I walked up to him I could smell. That was the second time I had suspicion that is what it was.

Q All right. Do you recall the preliminary hearing held out at Fulton County Jail?

A Yes, sir.

Q On June 22nd; and there was a Ms. Judy C. Tedards as the court reporter there?

A I don't remember who the court reporter was, but I remember the hearing.

Q And the question was asked, "What did you observe?" And the answer was given, "I had moved around to the tail of the plane. Officer Gordon had come around to the side with me. He opened the door and stepped out." I assume that means Mr. Franklin, "he" there means Mr. Franklin. "I could see big burlap bags stacked in the plane. I didn't think he was hauling hay."

A That is what I said, yes, sir.

THE COURT: You didn't think he was hauling what?

THE WITNESS: Hay.

THE COURT: All right.

Q (By Mr. Siefferman) Question, "Could you see inside the burlap bags?" Answer, "No, sir." Do you remember that question and that answer?

A The best I remember, that's correct, sir. I could not see inside the bags.

Q Now as I understand it, Lieutenant, Officer Gordon, after patting down and searching Mr. Franklin, led Mr. Franklin away to one of the police cars.

A Yes, sir.

Q And is it shortly thereafter that you reached in and got one of the bags that was in the airplane?

A No, sir, I did not.

Q Did you ever reach in and get one of the bags and open it?

A Eventually we got in the plane. First, sir, we looked for someone else and we climbed over—Officer Gordon climbed over. I told him to climb over the bags to the cockpit to see if anyone else was in the cockpit. (ST 36-45).

(EXAMINATION OF LIEUTENANT ROBERT DEARISO CONTINUED)

REDIRECT EXAMINATION

BY MR. HAYES:

Q All right. When you say you went into the plane to look for—to see if other individuals were in the plane, was there loose Marijuana in the plane at that time?

A Yes, sir, there was.

Q You observed Marijuana without opening any bag at all in the airplane?

A Yes, sir, I did. I had to walk on it to get in the plane. (ST 47).